HEARING ON THE CASE OF MARK GREGORY

HEARING

BEFORE THE

SUBCOMMITTEE ON CIVIL SERVICE

OF THE

COMMITTEE ON POST OFFICE AND CIVIL SERVICE HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

MAY 17, 1988

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THE CASE OF MARK GREGORY

TUESDAY, MAY 17, 1988

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL SERVICE,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, DC.

The subcommittee met, pursuant to call, at 2 p.m., in room 304, Cannon House Office Building, Hon. Patricia Schroeder presiding.

Mrs. SCHROEDER. Let me go ahead and open the hearing this afternoon. I will put letters in the record from the Justice Department saying that they will not be here today. We have sent them a letter saying that we will have another hearing, and we hope they can work it into their schedule to come then.

We are very disappointed they are not here today.

On April 11, Mr. Mark Gregory was a GS–3 clerk with the Community Relations Service of the Department of Justice, and he was fired because he was absent from work to receive experimental treatment for AIDS at the National Institutes of Health.

Two weeks before Mr. Gregory's termination, the Office of Personnel Management issued guidelines to all Federal agencies on how to handle employees with AIDS. I took the floor at that time and saluted those guidelines, because they stressed education, counseling, prohibited discrimination, and urged guidelines to the needs of HIV-positive employees.

The OPM guidance is sensitive and well-reasoned. Yet, the Department of Justice rejected this approach and refused to make any accommodation to Mr. Gregory's medical needs.

As a result of a flurry of negative publicity about the firing of Mr. Gregory, the Justice Department has had a change of heart. Yesterday, Justice management offered Mr. Gregory a 1-year temporary appointment, without the sort of job protections that came with the career job he formerly held.

By so doing, the Justice Department has admitted that they were wrong in terminating Mr. Gregory and that providing reasonable accommodation to his condition does not constitute an undue hardship on the agency. In other words, Justice has now admitted that the firing violated the law relating to the employment of handicapped individuals.

The time has come for the administration to swallow hard, admit that Justice made an unconscionable error, and restore Mr. Gregory to his former, career position. By doing so, the administration will demonstrate that the AIDS policy issued in late March is more than just good words.

Our hearing today is to serve notice on the Justice Department and all other Government agencies that we will not tolerate the type of cruel treatment meted out to Mr. Gregory.

We invited Attorney General Meese to today's hearing. At 12:30 today, we received a letter stating that Mr. Meese would not attend, citing the press of business and the Privacy Act. We immediately scheduled another hearing for Thursday, June 2, to provide Attorney General Meese with an opportunity to explain the actions of his Department.

We will hold that hearing unless this matter is settled to Mr. Gregory's satisfaction in the interim. A copy of the Justice Department letter to me and my response are attached.

[The information follows:]

ONE HUNDREDTH CONGRESS

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STEPHEN J. SOLARZ, NEW YORK
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COMMITTEE ON POST OFFICE AND CIVIL SERVICE
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122 CANNON HOUSE OFFICE BUILDING
Washington, DC 20515
TELEPHONE (202) 225-4025

May 17, 1988

Honorable Edwin Meese, III
Attorney General of the United States
Department of Justice
Washington, DC 20530

Dear Mr. Attorney General:

At 12:30 today I received a letter from Mr. Thomas M. Boyd, Acting Assistant Attorney General, informing me that you will be unable to testify at the hearing at 2 p.m. today of the Subcommittee on Civil Service. The hearing concerns the firing by the Department of Justice of Mark Gregory for absences necessary to pursue treatment for Acquired Immune Deficiency Syndrome (AIDS).

Mr. Boyd informed me that you cannot testify due to (1) concerns about the Privacy Act; (2) press of other business; (3) shortness of notice; and (4) negotiations now ongoing with Mr. Gregory and his counsel. Frankly, I find none of these reasons persuasive. You have already sought Mr. Gregory's waiver of certain rights under the Privacy Act.

Nevertheless, because the press of other business and the shortness of notice may have made your attendance difficult, I have now scheduled another hearing for 1 p.m. on Thursday, June 2 in room 304 Cannon House Office Building. Unless the matter is settled to Mr. Gregory's satisfaction before that time, I expect you to appear and present testimony on the Gregory case at that time.

In any case, the subcommittee expects the materials requested in the letter of May 11 in the very near future.

Thank you for your cooperation with this request.

Sincerely yours,

Pat Schroeder

PAT SCHROEDER
Chairwoman

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 17, 1988

Honorable Patricia Schroeder
Chairwoman
Subcommittee on Civil Service
Committee on Post Office and Civil Service
Washington, D. C. 20515

Dear Chairwoman Schroeder:

This responds to your invitation, dated May 11, 1988, to the Attorney General to testify at a hearing today and confirms the response communicated to Ellen Battestelli of your staff last week concerning this matter. The subject of the hearing is the status of Mr. Mark Gregory, who has been employed by the Community Relations Service.

The Attorney General will be unable to accept your invitation due to our concerns about compliance with the Privacy Act and the press of other business, particularly in light of the short notice provided in connection with this hearing. The Department's position with regard to Mr. Gregory remains under careful consideration. We have sent him the enclosed letter pertaining to the Privacy Act. We are preparing a written response to your inquiry for disclosure in accordance with the terms of the letter to Mr. Gregory.

Additionally, as your staff has advised, the Department offered Mr. Gregory a temporary appointment, beginning today, for a period not to exceed one year in the Community Relations Service. His employee benefits under this appointment would have continued on the same terms and conditions as under his previous appointment. For the period between April 26 and May 16, 1988, he would have been compensated at his usual rate of pay, as though he had been on active duty during that time. We have been informed that Mr. Gregory has declined this offer, but we are meeting with his counsel today.

We appreciate your interest in this matter.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General

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May 11, 1988

Honorable Edwin Meese, III
Attorney General of the United States
Department of Justice
Washington, DC 20530

Dear Mr. Attorney General:

I was shocked to read in this morning's Washington Post of the Justice Department's decision to fire Mr. Mark Gregory, a GS-3 clerk, because he was being treated for Acquired Immune Deficiency Syndrome (AIDS) related complex. If the Post story was accurate, this firing violates government-wide guidelines on dealing with employees who are infected with the Human Immunodeficiency Virus (HIV), violates rules on employee confidentiality, and is an affront to human decency.

Because of the outrageous nature of this action, I request that you appear personally and present testimony at a hearing of the Subcommittee on Civil Service at 2 p.m. on Tuesday, May 17, in room 304 of the Cannon House Office Building. By noon on Friday, May 13, please cause to be delivered to the office of the Subcommittee on Civil Service a complete copy of the Official Personnel Folder of Mr. Gregory, including leave records, performance standards, performance appraisals, SF-171, and applicable SF-50's. The subcommittee will respect the limitations imposed by the Privacy Act in the public release of any of these records.

If you have any questions concerning these requests, please contact Ellen Battistelli of the subcommittee staff at 225-4025.

With kind regards,

Sincerely yours,

Pat Schroeder

PAT SCHROEDER
Chairwoman

U.S. Agency Fires Clerk Under AIDS Treatment

Ex-Justice Employee Says Dismissal Violates Governmentwide Policy

By Sandra G. Boodman
Washington Post Staff Writer

The Justice Department has fired an employee who is undergoing experimental treatment for AIDS at the National Institutes of Health on the grounds that the man's absences rendered him incapable of performing his job as a clerk-typist.

Mark Gregory, 30, of Alexandria was fired April 25, several weeks after the Office of Personnel Management issued a governmentwide policy stating that employees with AIDS should be accommodated in the same manner as those with other serious medical conditions. The policy also prohibits discrimination against employees with AIDS.

Gregory, who lost his health insurance when he was fired from his GS 3 job, does not dispute the contention of officials at the Justice Department's Community Relations Service that he has missed 30 days of work since he was hired last July. But, he said, he took 10 days' leave without pay at the suggestion of his supervisor after his ailment was diagnosed as AIDS-related complex, a less severe form of the disease, and 14 more days to participate in an experimental treatment program at NIH.

"The only reason they fired me is because I'm sick and because I have AIDS," said Gregory, who said he plans to appeal his dismissal.

Justice Department spokesman Brad Marman declined to discuss the specifics of Gregory's case. "He's not being singled out," Marman said. "He was discharged because he could not perform the job on a full-time basis adequately" as required. Because Gregory had worked for the federal goverment for less than one year, Marman said, he was considered a probationary employee.

An official at OPM declined to comment on Gregory's case, but said that firing an employee for absences solely related to a serious illness is uncommon. In some cases, supervisors advance workers sick leave or leave without pay or shift them to less demanding jobs.

"During a probationary period a lot of considerations come into play," said Anthony F. Ingrassia, deputy associate director of personnel systems and oversight at OPM. "Nevertheless, I would say that it would be unusual to release someone solely because of a life-threatening illness."

Even before the OPM policy was released, lawyers who handle discrimination cases say, complaints by federal workers alleging AIDS discrimination were rare.

"My understanding is that most federal agencies have been very accommodating and compassionate," said Jeffrey Levi, executive director of the National Gay and Lesbian Task Force. "But it does not surprise me that the Justice Department might do something like this" in view of its previous position on AIDS in the work place.

In 1986 the department issued a controversial opinion that stated that AIDS was not a protected handicap under federal antidiscrimination law, and that employers may legally fire people with AIDS because of "a fear of contagion whether reasonable or not." That view was rejected last year when the Supreme Court ruled that persons with AIDS are protected under federal antidiscrimination statutes.

Gregory maintains that officials at the Community Relations Service, the branch of Justice that handles concerns of minority communities, did not make good faith efforts to accommodate his condition. Faustino Pino, associate director for administration at the Community Relations Service who fired Gregory, declined to discuss his case.

Gregory said that his doctor told him in October he had AIDS-related complex. He said he went to his supervisor and told her "in strictest confidence because I felt she had a right to know." At the time, Gregory said, his lover of four years was hospitalized in the final stages of AIDS.

At the time, Gregory said, his supervisor suggested that he take two weeks' leave "to get my act together." Gregory said he took leave without pay.

When he returned to work, he said, he was approached by several coworkers whom he knew only slightly. They told him they knew he had AIDS. Gregory said he was upset because he assumed his diagnosis would be kept confidential and instead "it had been blabbed all over the agency."

In November, Gregory said, he was temporarily shifted to part-time status, his salary reduced and he worked mornings—an arrangement suggested by his supervisors and approved by him. However, he said, no one was hired to fill in during the afternoons so he was expected to do eight hours work in four hours. "They expected me to function normally but never gave me any help," he said.

In mid-January, he said, his supervisors apparently reversed their decision about his part-time status. He said he was told that if he didn't go back to work full time he would be fired. "I was really exhausted but I came back," he said.

In March, Gregory said, his doctor recommended that he enter an experimental treatment program at NIH designed to test a promising new AIDS drug called ddA, dideoxyadenosine. Gregory said that his supervisors never responded to several written requests he made for leave without pay. He was hospitalized at NIH in mid-March and missed 14 days of work.

His remaining six days of absences, he said, were due to the death of his lover last month. On April 11 he received a letter saying he would be fired April 25.

Mrs. SCHROEDER. Mr. Gregory, we realize this is not a pleasant task for you, but we appreciate your being here.

STATEMENT OF MARK GREGORY, FORMERLY AN EMPLOYEE WITH THE DEPARTMENT OF JUSTICE

Mr. GREGORY. In October of 1987, I was diagnosed with AIDS-related complex. At that time, I had the first signs of AIDS, which are oral thrush and very low T-cell count and general fatigue with a minimum of activity.

At the same time, my roommate Larry Edwards was admitted into Capitol Hill Hospital and diagnosed with cytomegalovirus, another form of AIDS. He was in the more advanced stages of it at the time.

The Justice Department suggested, my supervisor suggested I take two weeks off to "get my act together," which there showed they didn't understand the disease. They were looking at it as the flu. You take two weeks off, you get over it. They didn't understand that it kills you.

Shortly thereafter, I got my 6-month review which was fully successful. One of my supervisors at this time found out that I was sick, and she proceeded to tell people in the office. The way I found that out was I went to tell a friend, and she said, "I already know what you are going to tell me." I said, "How do you know that?" She said, "Well, this person has already told me that you are sick, and what have you."

My confidentiality was breached at that point. She was also telling people that I had AIDS, which was incorrect. I have AIDS-related complex, which is the less severe form of the disease.

As my medical condition deteriorated, I was put on a part-time schedule as an accommodation, supposedly. When they put me on the part-time schedule, I was working 4 hours a day, but they didn't hire anyone to do the second half of the day's work. I ended up doing 8 hours' worth of work in 4 hours.

Needless to say, that wiped me out every day. It was too much. Then I was told, if I didn't come back full-time, I would be terminated. So, I came back full-time. At this time, in March, my doctor recommended that I go into NIH for a protocol—experimental drug protocol of a drug called DDA.

I requested advanced leave, which I never an answer back from. They never told me, yes, we are going to give it to you or we are not going to give it to you. I put in two memos requesting that they give me some kind of status on it, which they never did.

The initial paperwork that I turned in was paperwork from NIH doctors, government doctors, explaining what the government protocol was, what my problem was, how long the protocol would last.

Mr. Robert Martinez, the Director of the Agency, Acting Director of the Agency, said that that was insufficient. So I had to go through a lot of rigmarole getting my doctor to send in more paperwork. We finally got that done.

Meanwhile, I had already gone into the protocol. The second week I was in the protocol, which is an in-patient at NIH, my friend Larry went into the hospital at Capitol Hill once again.

They couldn't figure out what was wrong with him. I got out of NIH.

A week later, Larry died. A week after that, they terminated me. Their reason for termination was absenteeism due to my medical condition. They were totally insensitive to the fact that Larry had died. And just by firing me at that time, it was just very poor timing, very bad timing.

At this point, what has happened so far is they have tried to make amends, I guess, by offering me a temporary position, which I am not going to accept. I feel that they owe me my job back. I feel they fired me because I have AIDS, and they discriminated against me. That is it.

Mrs. SCHROEDER. Let me ask you a few questions. I think it is very important to point out that the Federal employee does not have the same protection that private sector employees do. Is that not correct?

In other words, when you are fired, what happens to your health insurance?

Mr. GREGORY. After being fired, my health insurance would be continued for 30 days. And if I did not continue to pay it myself, it would end. I would have no health insurance.

Mrs. SCHROEDER. So there is no bridge?

Mr. GREGORY. Right.

Mrs. SCHROEDER. I think it is necessary to have on the record why you would not accept a temporary appointment versus the career status?

Mr. GREGORY. A temporary appointment would not offer me any protection. They could, a week later, say it is a temporary appointment, we don't need you any more, and fire me. They are offering me a job in the same place I was working before, which that would be an impossible situation.

Mrs. SCHROEDER. A key components of the Office of Personnel Management's guidelines requires confidentiality. Is that why you think it would be impossible, that confidentiality has been breached so that everybody is aware of your situation where you work?

Mr. GREGORY. That, and I also still feel they are insensitive to AIDS. I doubt very seriously there has been any educational effort made in the agency since I was fired. I don't know how people could change their attitudes that quickly.

Mrs. SCHROEDER. Do you have any performance evaluations?

Mr. GREGORY. I do have a 6-month review, and I was rated fully successful.

Mrs. SCHROEDER. You were rated fully successful. I think you gave us the date of that, but when would that have been? Obviously within the last six months?

Mr. GREGORY. It was like in November, I believe, was when I got that.

Mrs. SCHROEDER. How many days were you absent altogether, and how many of those days were for direct medical care?

Mr. GREGORY. I was absent 30 days starting July 22. Actually, any absences that I had didn't start until after I was diagnosed.

Mrs. SCHROEDER. The diagnosis came before any absences?

Mr. GREGORY. Right. The first absence was the 2-week period, at their suggestion, that I take 2 weeks off to get my act together. Two weeks—well, 14 days was at NIH for the protocol, which leaves about 6 days unaccounted for. That was just dealing with Larry's illness, dealing with my own illness, doctors' appointments.

Mrs. SCHROEDER. Why would they not accept the protocol? I find it amazing that a Federal agency would not accept the doctors at another Federal agency, NIH.

Mr. GREGORY. That amazed me. I don't understand that. It was like they were trying to interfere with something that is going to save a lot of people's lives is what they were doing. I have no idea why they did it. At the time, it seemed really strange to me, too.

Mrs. SCHROEDER. The connection was your doctor recommended you to NIH. NIH said this is a good idea and told your employer. Your employer said they wouldn't accept that, that it was not adequate?

Mr. GREGORY. They said the consent form I gave them was not adequate, that was not sufficient evidence to show that I was really sick. That is the way I took it. Basically from what I understand what they said was, was that that was insufficient. That was the only word that he used.

Mrs. SCHROEDER. So you went on to NIH for this inpatient proto-

Well, I thank you very much for being here. I am very dismayed that the Justice Department couldn't come to explain their side. We will certainly not let this go. We realize that personally, it has to be very painful for you to come and reconstruct this. We appreciate your doing it, because it will make a difference for other people in the future.

We want to make sure that Federal policy is leading the way and not catching up. And it certainly isn't leading the way by ignoring the policy that we supposedly have. Thank you for being here. We will stay in touch.

Since we don't have any further witnesses today, we will adjourn until June 2. Thank you very much.

[Whereupon, at 2:30 p.m., the subcommittee recessed, to reconvene on Thursday, June 2, 1988.]